

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

PAYRANGE, INC.,)
)
 Plaintiff,)
) C.A. No. 23-278 (MN)
v.)
)
CSC SERVICEWORKS, INC.,)
)
 Defendant.)

Wednesday, March 27, 2024
2:00 p.m.
Teleconference

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE MARYELLEN NOREIKA
United States District Court Judge

APPEARANCES:

POTTER ANDERSON & CORROON LLP
BY: ANDREW MARK MOSHOS, ESQ.

-and-

WILSON SONSINI GOODRICH & ROSATI PC
BY: RYAN R. SMITH, ESQ.
BY: JAMIE Y. OTTO, ESQ.

Counsel for the Plaintiff

1 APPEARANCES CONTINUED:
23 PHILLIPS McLAUGHLIN & HALL, P.A.
4 BY: MEGAN C. HANEY, ESQ.5 -and-
67 SHOOK HARDY & BACON, LLP
8 BY: AMELIA E. MURRAY, ESQ.
9 BY: MARK D. SCHAFER, ESQ.
10 BY: RYAN D. DYKAL, ESQ.
11 BY: EVAN J. WEIDNER, ESQ.12 Counsel for the Defendant
1314 -----
1516 THE COURT: Good afternoon, counsel. Who is
17 there, please?18 MR. MOSHOS: Good afternoon, Your Honor. This
19 is Andrew Moshos from Potter Anderson on behalf of the
20 plaintiff, PayRange. And with me today are my co-counsel,
21 Ryan Smith and Jamie Otto from Wilson Sonsini. With the
22 Court's permission, Mr. Smith will be handling the argument
23 today.

24 THE COURT: All right.

25 MS. HANEY: Good afternoon, Your Honor. This is
Megan Haney from Phillips McLaughlin & Hall on behalf the
defendant, CSC. I am joined today by Mark Schafer, Amelia

1 Murray and Evan Weidner from Shook Hardy & Bacon. And I
2 believe Ms. Murray will handle the arguments today, if
3 that's acceptable to the Court.

4 THE COURT: All right. Thank you.

5 Good afternoon.

6 MR. DYKAL: I'm sorry. Thank you, Megan. Ryan
7 Dykal on for CSC. I apologize, Your Honor.

8 THE COURT: No problem.

9 I have the motion to dismiss. It has several
10 parts. There is the motion to dismiss the claims of the
11 '772 patent as being patent ineligible; the motion to
12 dismiss the inducement claims for the '772, the '208 and the
13 '608; and the motion to dismiss willfulness of those three,
14 or is the '045 included in there? I can't read my writing
15 there.

16 MS. MURRAY: Your Honor, this is Amelia Murray.
17 The '045 is not included in that last category.

18 THE COURT: Okay. So then as I understand it
19 from reading the papers, let's take willfulness first.
20 Willfulness, it doesn't appear that the plaintiff contest
21 that there aren't sufficient allegations of willfulness as
22 to the '772, '208 and '608. Is that correct, or at least
23 not at this time?

24 MR. SMITH: That's correct, Your Honor. Our
25 intent was only to allege willfulness on the '045 patent.

1 THE COURT: Okay. So your position is you
2 haven't even alleged it, so I don't need to grant the
3 motion?

4 MR. SMITH: That's correct, Your Honor.

5 THE COURT: All right. Defendant, why do you
6 think --

7 MS. MURRAY: Apologies. Willfulness was alleged
8 pretty generally in the complaint and there were no specific
9 allegations as to those three patents. So just in order to
10 make sure that there were no claims of willful infringement
11 we wanted to make sure to get those dismissed.

12 THE COURT: Okay. So I am not going to grant
13 the motion on that just because there is a representation
14 that there is no allegation of willfulness as to those
15 patents, so willfulness won't be in the case as to those
16 patents unless there is some kind of amendment.

17 All right. Then with respect to the '772
18 patent, patent eligibility, this one I have been trying to
19 get my head around. So the amended complaint alleged
20 infringement of at least claims 1 and 4, and sort of
21 specified those claims. The motion to dismiss seeks to have
22 all of the claims, 1 through 20, determined to be
23 ineligible, and then I got a letter saying claims 1
24 through 10 and 12 through 20 have been disclaimed, so the
25 only claim that's currently alleged, even though it's not

1 the subject of any pleading, is claim 11. Do I have that
2 correct?

3 MR. SMITH: Yes, Your Honor.

4 THE COURT: And when you start to say something,
5 if you could say who is speaking so that my court reporter
6 can make an accurate transcript, that would help.

7 All right. So I guess my question before I saw
8 that December 11th on the disclaimers was why is my looking
9 at claims 1 through 20 appropriate in light of the Federal
10 Circuit decision in *Hanz*? Defendant, that one is directed
11 at you.

12 MS. MURRAY: Apologies. Claims 1 through 20, I
13 believe at this point we're only asking the Court to look at
14 claim 11.

15 THE COURT: Yes, I know that. I know that. I
16 said that just a couple of seconds ago. But as I read the
17 Federal Circuit decision in *Hanz*, when there is not a
18 counterclaim, I'm supposed to look at the claims that have
19 been asserted in the pleadings. In the pleadings here, only
20 claims 1 and 4 were asserted. I understand that that has
21 now been changed, but the pleadings have not changed. So I
22 can't figure out why it was appropriate that I look at
23 claims 2 and 3, and 5 through 20. I need to understand why
24 that was appropriate so then I can also figure out if it
25 would be appropriate for me to look at claim 11 in the

1 circumstance.

2 MS. MURRAY: From --

3 THE COURT: Why is it appropriate under *Hanz* in
4 this circumstance to look at claims other than those in the
5 complaint?

6 MS. MURRAY: From CRC's perspective, in the
7 complaint the allegations were that at least claim 1 and 4
8 were being asserted.

9 THE COURT: But that was very similar language
10 to what the Federal Circuit looked at in *Hanz*. I mean, what
11 claims did they talk about infringement for or talk about
12 the elements of infringement?

13 MS. MURRAY: They discussed elements of
14 infringement for claim 1 and claim 4. We have not
15 specifically looked at that under *Hanz*.

16 THE COURT: But that's what happened in *Hanz*, so
17 in *Hanz* what happened is the district court had found all of
18 the claims to be patent ineligible and when it got to the
19 Federal Circuit, the Federal Circuit said no, the court got
20 it correct that the claims that were included in the
21 complaint were ineligible, but as there was no counterclaim,
22 the court should not have looked at those other claims. So
23 I'm trying to figure out whether -- it seemed to me like
24 we're in that situation in looking at actually the claims
25 that were in your original motion, and certainly claim 11

1 falls in that bucket, so that's why I'm trying to understand
2 why you think that the Federal Circuit would bless me doing
3 what you're asking, particularly when there is not even any
4 arguments that have been made directed right at claim 11.

5 MS. MURRAY: I think the defendant would benefit
6 from additional briefing on this point if Your Honor would
7 allow it.

8 THE COURT: Yeah, I don't think so. This motion
9 has been out there. I mean, certainly the Federal Circuit's
10 ruling was out there before, and I have issued plenty of
11 orders on *Hanz*, so no, I'm not going to let you brief it
12 further. Does that tell me you don't have a response today
13 as to why it would be appropriate for me to do that?

14 MS. MURRAY: That's correct, we do not have a
15 response to that.

16 THE COURT: Okay. So as I read the Federal
17 Circuit precedent, when there is no counterclaim at issue, I
18 should be looking at the claims that are asserted in the
19 complaint. Here the complaint with respect to the '772
20 patent did say at least 1 to 4, but then when it specified
21 elements of infringement it only concentrated on claims 1
22 and 4. So as I read *Hanz*, I don't think it's appropriate
23 that I would address the other claims.

24 I also understand that claims 1 and 4 are no
25 longer asserted and claim 11 is now the only one asserted.

1 If that's the case, then I would expect at some point that
2 the plaintiff is going to clean up its pleadings. Do I have
3 that correct?

4 MR. SMITH: Your Honor, this is Ryan Smith for
5 the plaintiff, PayRange.

6 I think based on the language, the relief
7 language and we amended our infringement contentions to
8 reflect only claim 11 was being asserted, at least from our
9 perspective we felt that was sufficient to satisfy notice
10 pleading with respect to the complaint and coupled with the
11 local rules, the local practice of the infringement
12 contentions. That being said, if it's more appropriate to
13 amend the complaint to reflect claim 11 more specifically,
14 we would request leave to make that amendment and we could
15 do so pretty quickly.

16 THE COURT: Yes. I mean, look, right now your
17 complaint only asserts infringement with any specificity
18 whatsoever about claims that no longer exist. Right?

19 MR. SMITH: With respect to claim 4, that's
20 correct. Claim 11 depends on claim 1.

21 THE COURT: But claim 1, but claim 1 in and of
22 itself is no longer a valid claim; right, no longer an
23 existing claim?

24 MR. SMITH: Correct.

25 THE COURT: All right. So it seems to me you

1 have to fix your pleadings because currently you don't have
2 any correctly well-pleaded allegations of a claim of
3 infringement of the '772 patent for a claim that exist.

4 MR. SMITH: Thank you. Your Honor, we will get
5 that.

6 THE COURT: Okay. Now we have talked about 101
7 which I am going to deny for the reasons I just said. And
8 willfulness. So that leaves us with inducement. And for
9 inducement, I guess I want to hear from the plaintiff really
10 what your allegations are because with respect to willful
11 blindness, it seems to me that you're asserting a bunch of
12 stuff that happened in maybe 2017 or 2018 as the basis of
13 willful blindness, but it certainly wasn't being willfully
14 blind to the patents as we are talking about here as we see
15 in 2021 and 2022.

16 So what are your -- I guess let's get into it.
17 What are your allegations of actual knowledge of the '772,
18 '208 and '608 patents? And if not actual knowledge, what is
19 it that you think in your complaint establishes willful
20 blindness of those?

21 Let's start with actual knowledge of those
22 patents.

23 MR. SMITH: Your Honor, before the complaint was
24 filed, we sent a presentation as well --

25 THE COURT: Could you start by telling your name

1 so that my court reporter knows who is talking.

2 MR. SMITH: Your Honor, apologies. Ryan Smith
3 for PayRange.

4 And before filing the complaint, I believe it
5 was approximately twelve days before that PayRange sent a
6 presentation discussing its intellectual property as well as
7 a draft complaint with the allegation to counsel for CRC.
8 So that was an instance of actual knowledge before the
9 complaint was filed.

10 THE COURT: So that was actual knowledge and
11 remind me when the original complaint was filed.

12 MR. SMITH: The original complaint I believe
13 was -- I have to pull this up. I think it was maybe March
14 of 2022. And so this was before that original complaint was
15 filed.

16 THE COURT: Okay. And that included assertions
17 of -- identified the '772, '208 and '608 patents and because
18 you had a draft complaint, it explains your assertions of
19 infringement?

20 MR. SMITH: Yes, Your Honor, I think the draft
21 complaint was very similar to the complaint we subsequently
22 -- the complaint, the original complaint in this case.

23 THE COURT: Okay. And so that actual knowledge
24 of those three patents, what was the date of that?

25 MR. SMITH: I believe the date was -- it was

1 approximately twelve days before we filed this, the original
2 complaint in this case.

3 THE COURT: Okay. Well, do you have that in
4 this amended pleading so that we have a date or did you not
5 put that in the amended pleading?

6 MR. SMITH: I believe we -- let me try and find
7 that.

8 THE COURT: Was that the March 3rd?

9 MR. SMITH: Yes, I believe that is, right.

10 THE COURT: Okay. So that was March 3rd, 2023.
11 Okay. And is that the only thing you're relying on for
12 actual knowledge?

13 MR. SMITH: For the '208, '608, and '772
14 patents, that's correct, for actual knowledge, Your Honor.

15 THE COURT: Okay. Now, tell me what you're
16 relying on for willful blindness.

17 MR. SMITH: And again, Ryan Smith for PayRange.
18 Your Honor is correct that we are relying on numerous
19 interactions that occurred prior to issuance of those
20 patents. But part of the -- I think a key point here is
21 that these all come from the same -- the '208, '608 and '772
22 patents do relate back to the '045 patent and that
23 particular patent was identified by number in at least one
24 presentation from PayRange. It was also marked on
25 PayRange's products. As alleged by PayRange in the

1 operative complaint, CRC received those products and used
2 those products with the patent marking on it. So they did
3 have knowledge of the '045 patent and that PayRange had
4 basically a family of patents that it was continuing to
5 prosecute, it had that in the presentation.

6 So while they did not have the specific patent
7 numbers, they certainly had a lot of bread crumbs that would
8 indicate that PayRange had patent IP and was continuing to
9 take steps to protect its intellectual property.

10 So that would in our view, not looking -- not
11 doing any analysis of PayRange's ongoing patent prosecution
12 on patent families that was according to PayRange directly
13 relevant to the product at issue from PayRange we believe
14 was willful blindness coupled with CRC's decision not to use
15 the PayRange system and instead use a competing vendor and
16 then develop their own system.

17 THE COURT: Okay. So now let me hear from the
18 defendant. Let's say that I agree with you that they have
19 not asserted willful blindness, then I couldn't tell from
20 your motion, I mean, I certainly allow post-suit inducement
21 based on notice from a complaint being enough to establish
22 knowledge of the patents and knowledge of infringement for
23 inducement, so why wouldn't that March 3rd, 2023 letter and
24 the draft complaint be sufficient?

25 MS. MURRAY: This is Amelia Murray from CRC.

1 Well, we certainly would ask the Court to follow
2 the rule put forth in *ZapFraud*, but obviously Your Honor
3 allows the complaint as --

4 THE COURT: Judge Connolly and I -- I have a lot
5 of respect for him, but we just have a difference of opinion
6 on this issue. So I know you cited to some of his opinions,
7 but that's not the way I read the law.

8 MS. MURRAY: And in that case, we simply don't
9 think that the March 3rd letter establishes any sort of
10 pre-suit knowledge. Obviously, you know, with the filing of
11 the complaints, those three patents were mentioned in the
12 complaint, so we don't have any arguments about that.

13 THE COURT: So in terms of pre-suit, though,
14 what -- I mean, all we would be talking about was an extra
15 twelve days. I'm not saying it wouldn't be all pre-suit
16 knowledge, it would be in the time that you got the notice,
17 right?

18 MS. MURRAY: Right. And this is Ameila Murray
19 again.

20 So if the case is that that letter does
21 establish the knowledge --

22 THE COURT: It's a draft complaint. What I'm
23 trying to figure out is are you saying that it didn't? I
24 mean, I don't have it -- I just have an allegation that they
25 sent you a draft complaint which you think if I'm making

1 inferences which establish that there was a disclosure of
2 the patents by number and a disclosure of how they contend
3 you infringed. So I am just going with that. I don't know
4 what -- I don't know what your position is on that.

5 MS. MURRAY: And we understand there is a split,
6 and so in that case, we don't contest that that would have
7 -- that that would have given the requisite knowledge.

8 THE COURT: Okay. So what I am going to do with
9 respect to this motion is I am going to grant it in part and
10 deny it in part. I am going to deny it with respect to
11 willfulness of the '772, '208 and '608 patents because there
12 is no willful allegation.

13 I am going to deny it as to claim 11 of the '772
14 patent because, one, I am not convinced that that issue is
15 actually properly before me, because it's not the subject of
16 any pleading in this case. And also, I don't have any
17 argument on that claim in particular. So I understand that
18 defendant says well, too bad for the plaintiff, they waived
19 any arguments that that claim is somehow independently
20 patent eligible if the other ones aren't, but I am not
21 comfortable with that and I think that the plaintiff should
22 have an opportunity to present any arguments that it has on
23 that.

24 But then I will grant it with respect to
25 inducement of the '772, '208 and '608 patents prior to the

1 receipt of the March 3rd, 2023 letter. And I will also ask
2 that the plaintiff look at the complaint and determine -- I
3 think for safety sake you should amend your pleading so that
4 you have asserted claims that actually exist in your
5 pleading, but that doesn't seem like it would take very long
6 for you to do.

7 So with that, anything else we need to discuss?

8 MR. DYKAL: Your Honor, this is Ryan Dykal on
9 behalf of CRC. We feel our arguments on 101 would apply to
10 claim 11, obviously, and so if PayRange filed an amended
11 complaint to assert claim 11, we just want to clarify that
12 it would be appropriate for us to renew our motion on 101
13 with respect to claim 11. Otherwise it would seem to be
14 quite a loophole to be able to plead a claim that you don't
15 actually assert and then drop it and avoid 101 motion from
16 the pleadings.

17 THE COURT: So you're suggesting you would file
18 a new motion?

19 MR. DYKAL: Yes, Your Honor.

20 THE COURT: Okay. I mean, I am not going to
21 stop you. I certainly understand that there are concerns
22 with the claims of that patent. I am not going to stop you
23 from filing the motion. I just don't want to be in a
24 position where if I were to grant that motion it would be
25 all for naught because the Federal Circuit could say look,

1 that claim wasn't properly in front of you.

2 MR. DYKAL: Understood, Your Honor. And thank
3 you.

4 THE COURT: All right. Anything else?

5 MR. SMITH: Your Honor, Ryan Smith for PayRange.

Just to clarify, does PayRange have relief to

7 file an amended complaint to specifically allege claim 11?

8 THE COURT: Yes. If you're going to do anything
9 else, you should, you know, show that draft amended
10 complaint to the defendant just to make sure that there is
11 not something else in there. If there is something else in
12 there that you want to add that is objectionable, I guess
13 you would have to follow my procedures for filing an amended
14 complaint. But if it's just to add in the information that
15 the claims, the other claims have been claimed and you're
16 now asserting claim 11, then you do have leave to do that.

17 I guess I should ask at this point, too, what's
18 the status of the IPR petition on the '772 patent?

MS. MURRAY: This is Amelia Murray for CRC.

20 That petition has not -- there has not been an
21 institution decision yet.

22 THE COURT: Do you have any expectation as to
23 when it might come out?

MS. MURRAY: I believe mid to late April.

THE COURT: Okay. Well, keep me posted on

1 what's going on with that decision as well.

2 All right. Anything else we need to discuss?

3 MR. SMITH: Your Honor, Ryan Smith. Nothing
4 from the plaintiff's perspective.

5 THE COURT: Thank you. Defendant?

6 MS. MURRAY: Nothing from the defendant, either.

7 THE COURT: All right. Thanks everyone. Enjoy
8 the rest of the week.

9 (Teleconference concluded at 2:24 p.m.)

10
11 I hereby certify the foregoing is a true and
12 accurate transcript from my stenographic notes in the proceeding.
13

14 /s/ Dale C. Hawkins
Official Court Reporter
U.S. District Court
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